No. 93-744

Supreme Court, U.S.
FILED
MAR 30 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
GREENWICH COLLIERIES, *et al.*,
Respondent.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
MAHER TERMINALS, INC., *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPOYERS, SHIPBUILDERS COUNCIL OF AMERICA, INC., MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AND THE AMERICAN WATERWAYS SHIPYARD CONFERENCE IN SUPPORT OF RESPONDENTS

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THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business throughout the U.S. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Collectively, the member companies constitute about 95 percent of the Nation's shipbuilding industrial mobilization base. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the maritime terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

The American Waterways Shipyard Conference is a not-for-profit conference of the American Waterways Operators. Its members build and service vessels for the barge and towing industry, and many of its 50 members are covered by the LHWCA.

Amici collectively comprise the vast majority of insured and self-insured employers covered by the LHWCA and a group self insurance facility, and thus have considerable expertise in adjudicating claims subject to the Act.

Amici hasten to point out, however, that they are not covered by the Black Lung Benefits Act ("BLBA"). Therefore, *Amici* are content to leave argument concerning *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3rd Cir. 1993) and the proper interpretation of this statute to Respondent Greenwich Collieries and its supporting *Amici*. These *Amici* will concentrate on *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277 (3rd Cir. 1993), the case below involving the LHWCA, which Act and its regulations differ from the BLBA.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

SUMMARY OF ARGUMENT

The "true doubt rule" ("rule") rejected by the Court below is the Federal Petitioner's latest zeitgeist in the field of administrative law. The so-called "rule" results from confusion generated by the interplay among three Federal Statutes—the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 901 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and several opinions of this Court.

Despite this statutory interplay, the fundamental question is whether or not the alleged rule is sanctioned by the APA § 7(c), 5 U.S.C. § 556(d), standards that Congress expressly incorporated into the LHWCA in 1972. *The answer turns on the fact that the alleged rule is not and has never been found in the LHWCA, and does not appear in any of the Department's published regulations.* This absence of statutory authority and permissible legislative regulation, readily admitted by Petitioner, Brief for Petitioner ("Brief") at 15, 23, places the fate of the

rule squarely within the adjudication standards and proscriptions of the APA § 7(c).[1]

The alleged rule clearly flies in the face of the burden of proof and evidentiary standards of § 7(c) of the APA. Despite this fact, the rule has been cleverly fashioned by the Federal Petitioner to supersede these standards in direct violation of the APA's anti-supersedure provision, 5 U.S.C. § 559. Consequently, the rule effectively impairs the jurisprudence governing claims covered by the LHWCA, including the two principal decisions of this Court that regulate the proper use of the Act's statutory presumptions, 33 U.S.C. § 920.

Not only is the rule without basis in the controlling LHWCA, the rule cannot be construed to co-exist with the two principal non-LHWCA opinions of this Court upon which the Federal Petitioner relies heavily. *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981): and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), easily the most misunderstood authority in the Federal Petitioner's arsenal.

The Federal Petitioner advances the rule under cover of the considerable judicial gloss that was attached to the LHWCA over the years before the massive reforms made by Congress in 1972, P.L. 92-576, and in 1984, P.L. 98-426, and a claim of deference to the Labor Department's alleged "longstanding" *policy* expertise and administrative judgment. This last claim is somewhat puzzling given the fact that, according to some authorities, the rule was first adopted by the *non-policy* making Benefits Review Board ("BRB"). But whatever the origin of the rule, some element of the Department of Labor has allowed its notions of jurisprudence to thwart Congress' 1972 adjudicatory reforms to the LHWCA, and several

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[1] Equally true of the Black Lung Benefits Act ("BLBA"), see *Grizzle v. Pickands Mather Coal Co.*, 994 F.2d 1093, 1096 (4th Cir., 1993) ("The Director of the Office of Workers' Compensation Programs admits that 'the Black Lung Benefits Act does not explicitly allocate the risk of non-persuasion in black lung cases.' ") (citations omitted).

opinions of this Court that have removed 45 years of prior judicial gloss from the Act's early interpretations.

Amici concede that in one regard the Petitioner is acting in consonance with several provisions of the APA, specifically 5 U.S.C. §§ 552 and 553, requiring respectively that all rules, substantive or interpretive, be published in the *Federal Register* and that substantive rules, i.e., those promulgated pursuant to legislative authority, be subject to the Act's rulemaking procedures. Obviously this alleged "rule," which lacks the substance of a *bona fide* rule—the hallmark of a litigating position—need not be made to comply with these two APA formalities.

The true doubt rule is, then, constructed entirely of bureaucratic revelation, and should be viewed—not as the administrative determination that it is claimed to be—but as the insupportable litigating position of the Department of Labor that it actually is. Unless rejected, the rule is bound to haunt future administrative determinations in other settings that also implicate the proper assignment of the "burden of proof" under the APA.[2]

Amici respectfully submit that the Third Circuit's construction of the LHWCA and the APA is consistent with this Court's recent decisions concerning statutory interpretation. The administrative interpretation advanced by the Federal Petitioner contradicts an unambiguous statutory scheme and its legislative history and deserves no deference by this Court. Therefore the decisions below should be affirmed by this Court.

[2] One only need read the latest pronouncement of the Administrative Conference of the United States to appreciate Agency confusion over the APA's proper allocation of the burden of proof—"The ultimate burden of persuasion in any case depends on the substantive statute involved and the burden of persuasion may be allocated among parties, or shift from one party to another, depending on the issue. *As a consequence, the model rule only addresses the initial burden of going forward with the evidence.*" *Model Adjudication Rules,* Administrative Conference of the United States (Dec. 1993), p. 105 (emphasis added).

It appears to *Amici* that agencies other than the DoL are either every bit as confused by the present state of affairs or are lining up to claim the right to assign the burden of persuasion despite the plain language of the APA, which assigns the entire burden of proof "except as otherwise provided by statute." 5 U.S.C. 556(d). There are no such statutory exceptions in either of the two cases now before the Court.

ARGUMENT

An analysis of both *Maher Terminals* and *Greenwich Collieries* and the related cases noted below that are pending a writ of *certiorari* reveal that the Petitioner's arguments in support of the alleged "true doubt rule" ("rule") boil down to deferring what is essentially a "remedial alternative" conceived by the non-policy making Benefits Review Board ("BRB") and now advanced "on behalf of the Secretary of Labor" through litigation.

In its Brief ("Brief") on the merits, Petitioner initially labels the rule a "principle of adjudication" (p. 14). Later it becomes a "settled evidentiary rule" (p. 18), an "administrative answer" (p. 19), an "administrative practice" (p. 26), and finally "a rule of construction" (p. 46). This muddling of jurisprudence is remarkable only in that it is entirely consistent with Petitioner's prior inconsistent arguments advanced below and in other courts.

Adding to this confusion, two circuit courts in BLBA cases recently have labeled the rule a "judicial construct," *Skukan v. Consolidation Coal Co.,* 993 F.2d 1228, 1236 (6th Cir. 1993), pet. for cert. pending, No. 93-964; and *Freeman United Coal Mining Co. v. Director, OWCP,* 988 F.2d 706, 709-710 (7th Cir. 1993), pet. for cert. pending, No. 93-935, while upholding its validity. Another circuit, apparently accepting the rule has described it as another "presumption," *Grizzle v. Pickands Mather & Co.,* 994 F.2d 1093, 1097 (4th Cir. 1993).

In cases preceding the Department of Labor's ("DoL") recent claim of right to assign the burden of persuasion as a matter of policy, other circuits have referred in *dicta* to the resolution of doubtful factual questions as a "judicial policy," *Bath Iron v. White,* 584 F.2d 569 (1st Cir.

1978); a "statutory policy," *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968); and an "overall humanitarian 'statutory' policy," *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980).

Only the court below has figured out that—no matter what label given the alleged rule or by whom—the rule is really a product of pure judicial gloss. The Third Circuit properly concluded that there is simply no basis within the LHWCA or the APA that authorizes the Secretary of Labor to embrace such a rule. Presumably, this is why the rule in fact does not appear in any of the Department's published regulations. As such, the rule is advanced despite the Department's lack of statutory authority to assign the burden of persuasion under the APA.

I. THE TRUE DOUBT "RULE" IS LEGAL SOPHISTRY PUSHED BY A FEDERAL AGENCY BENT ON IGNORING CONGRESSIONAL COMMANDS AND DECISIONS OF THIS COURT

A. The Recent Birth and Practical Effects of the Rule

Whether or not the "true doubt rule" is described in terms of evidence, practice or principle, the "rule" as presently formulated by the Federal Petitioner holds that the Department, either the Benefits Review Board ("BRB") or the ALJ, may assign the burden of persuasion to an employer contesting an LHWCA or a BLBA claim in either "close cases," Pet. for Cert. p. 17, or "when evidence is evenly balanced," Br. p. 19. Heretofore "equipoise" has been the Petitioner's preferred term of art triggering the rule, Pet. for Cert. p. 15.

The Federal Petitioner claims that this alleged "rule" has been followed since the dawn of the LHWCA (Br. at 23) and therefore does not violate the burden of proof requirement of the APA, if indeed APA § 7(c) even applies in the first place.[3] The Fourth Circuit, however,

[3] *Amici* note that the Federal Petitioner's latest fall back argument is to now deny that § 7(c) applies to LHWCA adjudications in the first place (Br. at 43). But see, II-A, *infra*.

dates it to a 1978 BRB opinion dealing with a BLBA disputed claim, a much more likely birthday.[4]

Regardless of the genesis of the true doubt rule, its net effect *in the LHWCA* context, coming into play as it supposedly does only after an employer's substantial evidence has defeated any benefit provided to a claimant by the Act's statutory presumptions, thus requiring the factfinder to decide a case on the basis of the record considered as a whole, *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982), is to undermine these two opinions completely and reverse the ultimate burden of proof, i.e., the risk of non-persuasion, assigned by the plain language of § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). See, II-B, *infra*.

Remarkably this "longstanding" rule was not even mentioned in the Federal Petitioner's brief seeking denial of *certiorari* in *U.S. Industries*, which is the last case to come before this Court concerning the proper construction of the Act's statutory presumptions. Curiously, some six years later, in *Mullins Coal v. Director, OWCP*, 484 U.S. 135 (1987), a Black Lung Benefits Act case dealing with that Act's statutory presumptions, the Federal Respondent filed a brief on the merits replete with references to the true doubt rule, citing as authority for the rule *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978).

Amici can't help but to speculate that it appears that the DoL must not have been ready to spring this "longstanding" rule on the Court in 1982, despite the fact that statutory presumptions and the true doubt rule are, at the very least, kissing cousins, and hence chose not to file a brief on the merits in *U.S. Industries*.

Springing up as it does shortly after *U.S. Industries*, the rule assumes the flavor of a "remedial alternative" to both that decision and its antecedent *Bowers*, the two

[4] *Grizzle v. Pickands Mather and Company/Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993) citing *Provance*, *infra*.

opinions of this Court that govern the proper use of the LHWCA statutory presumptions.

As a consequence of the "rule" the employer is saddled with an evidentiary burden—in cases arbitrarily designated "close" by an ALJ or the BRB—that bears no practical difference to the clear and convincing standard of persuasion required by the Courts or assigned by statute in special civil situations.[5]

Amici would also like to point out that evidentiary equipoise need never occur, as the LHWCA has built in safeguards designed to avoid this precise state of affairs.[6]

Any analysis of the "rule" must start with an examination of the original LHWCA and the sweeping reforms made to the Act by Congress in 1972 and 1984.

B. The Alleged Rule Finds No Support in the Original LHWCA and Its Subsequent History

The Longshore and Harbor Workers' Compensation Act ("LHWCA" "ACT"), 33 U.S.C. 901 *et seq.*, is a comprehensive federal statute enacted in 1927 after this Court held that state compensation statutes could not con-

[5] E.g., "[W]hen greater degrees of certainty are thought necessary," *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, —— U.S. —— (1993) (slip opinion at 19). Courts have required an elevated standard in certain civil situations involving fraud, wills, oral contracts, etc. See 9 Wigmore, *Evidence* § 2498 (Chadbourn rev. 1981).

Congress has also set a clear and convincing standard in certain civil situations, e.g., in extraordinary circumstances, a higher burden has been placed on the federal government, which is the party in possession records, in order to prevail against claims submitted by wounded veterans who cannot possibly be expected to produce records of the same quality. 38 U.S.C. 1154.

[6] The following provisions of the LHWCA are rendered superfluous whenever the true doubt rule is employed. The BRB may remand a case to an ALJ "for further appropriate action," 33 U.S.C. § 921(b)(4): either the BRB or the ALJ can "make such investigation or inquiry . . . to best ascertain the rights of the parties," 33 U.S.C. § 923(a), 20 C.F.R. § 702.339. This includes, whenever warranted, referring a case to another impartial specialist. 33 U.S.C. 907(e), 20 C.F.R. § 702.408.

stitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that Congress could not delegate regulation of federal maritime jurisdiction to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Congress subsequently tailored the Act to fill this gap and compensate certain classes of maritime workers injured or killed seaward of the so called *Jensen* line.

As with all such statutes, the Act accomplished this by compromising the common law rules effecting the interests of employers and injured workers. Similar state statutes had long been upheld by this Court from constitutional challenge, providing the statute provided a reasonably just substitute for common law rights. See, e.g., *New York Central R.R. v. White*, 243 U.S. 188 (1917). Congress then designed the Act to minimize contested claims by encouraging voluntary compensatory payments whenever possible, and the use of informal administrative proceedings, without resort to traditional litigation.[7]

This compromise certainly did not encompass rejection of the common law rules that place the burden of proof, and hence the burden of persuasion, on a party initiating a claim. Professor Larson's thoughts are instructive: "No amount of informality can alter the elementary requirement that the claimant allege *and prove* the substance of all essential elements in his case." A. Larson, 2B *The Law of Workmen's Compensation*, § 77.44, pp. 15-39 (1993) (emphasis added). This Court has also recognized this principle. *U.S. Industries* at 614 n.7.

The original LHWCA contained no burden of proof or evidentiary standards governing administrative outcomes. However, Congress did include several provisions that exemplified its remedial purpose, including a series

[7] Since inception, the LHWCA has anticipated that most claims will be resolved without dispute, as over 95% presently are, but permits employers to contest suspect claims. 33 U.S.C. § 914. Initial administrative adjudication procedures are set out at 33 U.S.C. § 919. Appellate procedures are set out at 33 U.S.C. § 921.

of presumptions governing claims, "in the absence of substantial evidence to the contrary." 33 U.S.C. § 920.

This Court held shortly after enactment that the statutory presumptions do not achieve the quality of affirmative evidence, and fall out of the case "once the employer has carried his burden" by demonstrating "substantial evidence to the contrary." *Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935). Accord, *U.S. Industries* at 616.

Justice Brennen's dissent in *U.S. Industries* captures the relationship of the LHWCA's presumptions to the Act's remedial purpose. "By its terms, and quite in contrast to the practice in judicial proceedings, § 20(a) requires the employer to take the initial steps to disprove his liability. This *preliminary shifting of the burden* to the employer exemplifies the 'humanitarian nature of the Act' . . ." 455 U.S. 617 (citations omitted) (emphasis added).

From the Act's inception this Court recognized that it was remedial in nature and that its provisions were to be construed liberally. *Baltimore & Philadelphia Steamboat Co. v. Norton,* 284 U.S. 408 (1932) ("[A]re deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."); *Voris v. Eikel,* 346 U.S. 328, 333 (1953) ("The Act must be liberally construed in conformance within its purpose, and in a way which avoids harsh and incongruous results.").[8]

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[8] To the Federal Petitioner, of course, these statements have evolved to a construction of the Act and its provisions that "should be construed liberally in favor of the employees or his dependents" regardless of the plain language of the Act. Br. at 25. Frequently this bias toward a liberal construction includes formulating a "remedial alternative" to the Act, as in this case, or endorsing a "recent trend" in workers' compensation law. But see, e.g., *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, (1980) and *Morrison-Knudsen Construction Co. v. Director, OWCP,* 461 U.S. 624 (1983), two opinions of this Court rejecting "remedial alternatives" and "recent trends" to the plain language of the LHWCA.

Over time the Act's benefit structure proved inadequate and its coverage provisions confusing. Despite these two flaws, or perhaps because of them, the Act's remedial purpose and humanitarian nature gave it an almost hallowed status before the courts. Judicial gloss abounded in *dicta.* Whenever some appellate courts found it necessary to strain for reasons to uphold compensation awards to injured workers, "all doubtful fact questions [are] to be resolved in favor of the injured employee . . ." *Young & Co. v. Shea,* 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied,* 395 U.S. 920 (1969); "When there is doubt, it should be resolved in favor of the injured employee or his dependent family." *Fidelity & Casualty Co. of New York v. Burris,* 59 F. 2d 1042 (D.C. Cir. 1932).

It is this pre-1972 judicial gloss, still fashionable today in some of the circuits, that forms the entire basis for the Federal Petitioner's allegation that a true doubt rule has existed since the inception of the Act.

A close reading of the pre-1972 case law, despite the Federal Petitioner's assertions to the contrary, clearly reveals that not one authority cited stands for the proposition that the Secretary of Labor has the statutory authority to administratively assign the burden of persuasion in close cases. Nor, until recently, did the DoL ever claim such authority.

C. The LHWCA Reforms of 1972 and 1984 Lend No Credence to the Alleged Rule

Congress addressed these statutory flaws by substantially overhauling the Act with the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576 ("the Amendments"). Further changes were enacted in 1984 in an effort to fine tune the 1972 Amendments.[9]

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[9] The Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426.

The 1972 Amendments comprised a reticulated series of carefully balanced reforms to the Act. Benefits were increased, coverage was expanded landward of the *Jensen* line, and third party recovery obligations recast and clarified. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 261 (1977) ("Caputo").

Included amongst these reforms, and, in fact, absolutely necessitated by the other adjustments made to the Act, was an overhaul of the Act's antiquated dispute resolution process. Congress accomplished this overhaul by, *inter alia*, creating an "independent" internal adjudicative review process, the Benefits Review Board ("BRB"), 33 U.S.C. § 921(b), and assigning initial adjudicatory functions to Administrative Law Judges, vice deputy commissioners, under the administrative and policy making authority of the Department. 33 U.S.C. § 919(d). The BRB was then constituted by the Secretary to be independent of the newly created Office of Workers' Compensation Programs ("OWCP"), but still within the ambit of the DoL. The DoL publishes rules and regulations for the operation of the BRB (20 C.F.R. § 802 *et seq.*).

Congress felt compelled to take this action because it feared that the LHWCA "[Had] suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings[.]" H. Rept. 92-1441, p. 11, 92d Congress, 2d Sess.; S. Rept. 92-1125, p. 13-14. 92d Congress, 2d Sess. Consequently it realigned the Act with modern notions of fairness and due process in order to expunge the built in bias then rampant within the administration of the Act.

This was accomplished explicitly by applying the APA —with the most all inclusive possible proviso—to all claims adjudications conducted under the Act. Congress accomplished this by adding a new section, § 19(d), which reads in part "*Notwithstanding any other provisions of this Act*, any hearing held under this Act *shall* be conducted in accordance with the provisions of § 554 of Title 5 of the United States Code." 33 U.S.C. § 919(d). (emphasis added)

If Congress was ever going to modify the burden of proof requirement of the APA as it applied to LHWCA adjudications and assign the risk of non-persuasion to the employer upon evidentiary equipoise or in close cases, or grant this authority to the Secretary of Labor, this would have been the perfect opportunity. It clearly did not do so. Instead Congress removed any doubt as to the applicability of the APA to LHWCA adjudications, and thereby rendered meaningless all the pre-1972 court decisions relied upon by Petitioner to support its claim that the Act has long fostered a true doubt rule.

Congress did reaffirm the existing evidentiary informality principle found in § 23(a) by extending it to hearings conducted by the newly created BRB. Henceforth all LHWCA hearings "shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, *except as provided by this Act* [.]" 33 U.S.C. § 923(a). (emphasis added)

The informality principle results from the initial compromise of common law norms, as discussed above, and is a *quid pro quo* for the removal of compensation claims from the litigation arena. Thus formal legal rules of evidence are to be relaxed in administrative claims hearings. Professor Larson places the informality principle in proper perspective:

> "The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. On the other hand, as every lawyer knows, there is a point beyond which the sweeping aside of "technicalities" cannot go, since evidentiary and procedural rules usually have a core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." A. Larson, 2B, *The Law of Workmen's Compensation*, § 77A.10, p. 15-2 (1993).

Of course § 23(a)'s last proviso "except as provided by this Act" explicitly subsumes all LHWCA administrative hearings conducted with this section's attendant infor-

mality principle into § 19(d)'s express application of APA standards—"Notwithstanding any other provisions of the Act, any hearing . . . shall be conducted. . . ."

The provisos of § 19(d) and § 23(a) then, whether read independently or together, support only one conclusion; Congress intended to apply the APA, including the § 7(c) burden of proof standard, to any and all administrative hearings conducted under the Act. The Federal Petitioner's strained interpretation of these two sections can only come about by omitting the key proviso of § 23(a) and ignoring the plain meaning of both this section and § 19(d) and Congressional intent.

The 1972 Amendments did not disturb § 20, 33 U.S.C. § 920, presumptions and left this Court's *Del Vecchio v. Bowers*, opinion governing their use, as discussed above, intact.[10] Both House and Senate Reports also called on the Secretary of Labor to "take full advantage of the requirement of separating the functions under the statute to consider a complete reorganization . . ." S. Rept. 92-1125, p. 14; H. Rept. 92-1441, p. 11. This was later accomplished through the creation of the OWCP.

Congress' new scheme was designed especially to avoid a biased adjudicatory process through continued commingling of the administrative and adjudicatory functions within the DoL, and conflicts of interests between Department personnel, whether actual or apparent.[11]

Enactment of the 1972 reforms brought the Act's dispute resolution process into the modern era, on par with those of other federal labor laws. These reforms

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[10] In fact Congress in 1984 expressly reaffirmed this Court's opinion in *U.S. Industries*, concerning the proper application of the § 20 presumptions in accordance with *Bowers*. Conf. Report to S. 38, H. Rept 98-1027, p. 33 (98th Congress, 2d Session); S. Rept. 98-81, p. 37 (98th Congress, 1st Session).

[11] Prior to 1972, legal contests between employers and claimants simply failed to measure up to modern notions of due process and fairness. Quasi judicial hearings were held by the administrative authority, the deputy commissioners, and the only review was to the federal courts.

upgraded what was a seldom utilized remedial statute administered in a haphazard fashion by a backwater agency to a model workers' compensation statute which is to be administered in an unbiased fashion by a transformed DoL.

D. The Judicial Response to the 1972 Reform Amendments Give No Credence to the "True Doubt Rule."

This Court subsequently recognized that the 1972 Amendments represented a sea change in the nature of the LHWCA. As noted by Justice Marshall in the Court's first case dealing with one of the principal reforms made —the landward expansion of coverage—the Amendments represented "the first significant effort to reform the 1927 Act and the judicial gloss that had been attached to it." *Caputo*, 432 U.S. 249, 261 (1977). Two terms later the Court noted the "new means of adjudicating compensation cases," another of the reforms made in 1972. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 n.11 (1979).

Each of the subsequent opinions of this Court has one common denominator. Despite dealing with many different issues, this Court has consistently rejected expansive arguments that rely on prior judicial gloss and/or Labor Department interpretations seeking "remedial alternatives" or endorsing "recent trends." See, e.g., *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 280 (1980) (The remedial purpose of the Act . . . "has insufficient force to overcome the plain language of the statute itself."); and *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 635 (1983) ("[A] comprehensive statute such as this Act is not to be judicially expanded because of 'recent trends.'")

This Court has held consistently that the words of the reformed Act mean exactly what they say. "The controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of [the] statute[] as written." *Cowart v. Nicklos*, 505 U.S. ——, slip opinion at 6 (1992); Theories or concepts that ap-

pear "nowhere in the Act" and that are "never mentioned by Congress during the legislative process" and that don't "comport with Congress' intent" have been unceremoniously rejected by the Court. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 322 (1983) (rejecting maritime but local defense). Cf. *Caputo*, (rejecting "point of rest" as jurisdictional limit of the 1972 Amendments.)

As noted above the true doubt rule appears nowhere in the Act, has never been mentioned by Congress, and does not comport with the express intent of Congress to incorporate the APA, and therefore must be construed accordingly. As Chief Justice Rehnquist admonished in one case concerning a particularly troublesome change made by Congress in 1972, "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.'" *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979).[12]

As this Court could not rewrite Congress words then, neither can it do so now by reading a true doubt rule into the reformed Act. It simply is not found in the LHWCA/APA statutory scheme.

E. The Department of Labor Continues to Ignore the 1972 Amendments and Opinions of this Court

Despite the 1972 Amendments and the opinions of this Court issued since *Caputo*, the Department of Labor persists in taking litigating positions not reflected in the LHWCA or in the Department's published regulations. Like the two cases below, this causes considerable confusion in the circuits. See, e.g., *Ryan Walsh v. Trainer*, 601 F.2d 1306 (1979). *Maher* and *Greenwich Collieries* are only the latest such cases. This Court, too, has seen more than its fair share of DoL inspired litigating problems.

For example, the Department's propensity to take insupportable *ad hoc* litigating positions has led to recurring embarrassment before this Court. At least thrice since the 1972 Amendments, the Department has either flip-flopped positions between an appellate decision and Supreme Court review,[13] or advanced another "remedial alternative" like the cases below.[14]

Amici submit that these three opinions and the two cases now before the Court have one thing in common; all result from the continuing confusion within the Department generated by the conflict of interest at the Department's legal advisory level. The Department's legal advisor represents both the Director, OWCP and the BRB (20 CFR § 702.333; 20 CFR § 801.402). This, in turn, leads *Amici* to seriously question which party *de facto* sets DoL policy. Is it the Solicitor of Labor in conjunction with the BRB or is it the Director, OWCP represented by the Solicitor of Labor? The statutory interpretation of which client goes forward in litigation? Or, as in this case, is it the brand new interpretation of the Solicitor's third client, the Secretary of Labor, that goes forward? *Amici* suggest that this is the real problem behind this Court's concerns in *Caputo*, 256, n.11, and *Perini North River*, 303, n.10 and n.11, and that the Department only cured the problem superficially when it promulgated new regulations in the interval between these two opinions. Simply indicating in regulations the proper party for appellate concerns has not clarified the confused chain of command in the Department.

"Mistakes" and "altered positions" are one thing: usurpation of delegated legislative authority through unauthorized litigating positions is quite another. What is

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[12] *Rasmussen* was subsequently overturned by § 9 of the 1984 Amendments to the Act, P.L. 98-426.

[13] Two flip-flops: *Morrison-Knudson* at 645 ("The Director has now switched sides. Of course, agencies often make mistakes and disavow prior positions. . .") ; *Cowart* (slip opinion at 6) ("[T]he Director of the OWCP and the Department of Labor have altered their position. . . .").

[14] *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 279 (1980), ("The notion that the plain language of the LHWCA might not mean what it says is thus a relatively recent development surfacing for the first time almost 50 years after its enactment.").

abundantly clear, moreover, is that Petitioner has not even bothered to consult with other agencies within the Department of Labor in its efforts to portray the longshoring industry as inherently hazardous and longshoreman as in need of special federal protection (Br. at 25). Petitioner relies on language in a 22 year old Senate Report that clearly is outdated. Had Petitioner checked with the expert authority available within its own Department, e.g., the Occupational Safety and Health Administration or the Bureau of Labor Statistics, it could have learned that longshoring does not even show up on the Department's target list of unsafe industries, and that the typical longshoreman in need of the department's protection now earns well over $50,000 annually, exclusive of pension, health and other fringe benefits.[15]

This Court should no longer condone the Department's state of confusion. Even at this late date, it still reigns. For example, attorneys with the Department of Labor now apparently understand that they cannot continue to rely on advancing the true doubt rule "on behalf of the

[15] See e.g., the most recent annual survey by the Bureau of Labor Statistics of occupational injuries and illnesses, *"Workplace Injuries and Illnesses in 1992"* dated December 15, 1993. Longshoring doesn't show up in the appendix to this report listing the incidence rate of the 40 most offending industries. To be sure Longshoring does make the top 40 in days away from work rates, but this is not unexpected given the fact that modern marine terminals produce almost no opportunity for light duty.

Had the Federal Petitioner checked OWCP's own statistics, it would have been informed that LHWCA lost time injuries and claims are down steeply—approximately 50%—over the past 10 years, despite record tonnage going through marine terminals. *Annual Report on the Administration of the LHWCA for Fiscal Year 1992*, Employment Standards Administration, U.S.Dol (1993). In part this is do to industry-labor safety programs, and collectively bargained drug and alcohol testing programs.

As for longshore wages, the average annual wages on the Pacific coast are as follows: 90% of longshoreman earn in excess of $60,000; 94% of clerks earn $86,000; and 92% of foremen earn $117,000. This is *exclusive* of pension, health, milage, non-taxable meals, etc. *Annual Report, Pacific Maritime Association* (1993). Atlantic and Gulf coast wage scales are commensurate.

Director, OWCP" when proclaiming this "longstanding" rule of administrative law, given the fact that the OWCP did not even exist unitl 1972. So with the latest Brief on the merits the rule is now attributed to a longstanding "determination by the Secretary" (Br. at 15).

II. THE FEDERAL PETITIONER IS ATTEMPTING TO RENDER THE APA MEANINGLESS

A. Despite Petitioner's Contention to the Contrary, the 1972 LHWCA Reforms Expressly Incorporate § 7(c) of the APA

As noted at I-C, *supra*, one of the fundamental reforms made to the LHWCA by Congress in 1972 was the clear language of § 19(d), 33 U.S.C. § 919(d) expressly incorporating 5 U.S.C. § 554 into the LHWCA, and thus adopting the APA § 7(c) evidentiary and burden of proof standards set forth at 5 U.S.C. § 556(d), for all administrative hearings.

Under the reformed procedures, all disputed claims, whether at the ALJ level or the BRB level, are to be resolved expressly and explicitly in accordance with the APA. The published regulations promulgated almost contemporaneously by the Secretary of Labor faithfully reflect this fact (20 C.F.R. § 702.332).[16]

Despite both the plain language of the LHWCA and the Department's regulations, the Federal Petitioner, which has heretofore acknowledged that the APA "generally" applies to LHWCA claims adjudications (Pet. for Cert. at 16) now argues that "in any event, whatever restrictions § 7(c) imposes do not apply to claims ad-

[16] 20 C.F.R. § 702.332 reads as follows: "Formal hearings; how conducted. Formal hearings shall be conducted by the administrative law judge assigned the case by the Office of the Chief Administrative Law Judge *in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 554 et seq.* All hearings shall be transcribed." (emphasis added)

While BRB regulations do not contain a similar provision, the BRB acknowledges the statutory role of the APA. See *Longshore Desk Book*, APA 1-5 (1987).

judications under the LHWCA and the BLBA." Br. at 17, repeated at 34 and 43. Petitioners claim that the exculpatory sentence of APA § 7(c), "*except as otherwise provided by statute,* the proponent of a rule has the burden of proof [.]" should be read to "preserve the general flexibility concerning evidentiary and procedural rules prescribed by § 23(a) of the LHWCA . . ." Br. at 46.

Petitioner's argument is disingenuous. The conclusion, that the LHWCA "otherwise provides [the true doubt rule] by statute" can only be reached by reading out of the LHWCA the two key phrases that incorporate the APA. Besides ignoring the all inclusive language of § 19(d) "Notwithstanding any other provisions of this Act, any hearing . . . shall be conducted in accordance with the provisions of § 554 of Title 5 . . . ," the Petitioners also omit the critical proviso, "*except as provided by this Act.*" found in LHWCA § 23(a), 33 U.S.C. § 923(a), which, as noted *supra* at I-C, governs the scope of the rules of evidence and procedure during informal hearings.

Recognizing that this last omission is the linchpin of its LHWCA statutory construction, the Federal Petitioner has taken every opportunity on brief to write the offending proviso from the Act by failing to quote the entire § 23(a). (See, e.g., Brief at 18, 24, 43, and at 45-46).[17] Although this last misquote acknowledges the omission in the following paragraph (Br. at 46), Petitioner immediately attempts to confuse the issue by deflecting the grammatical shortcomings within the brief, and suggesting that any argument employing all the words of the section is circular.

As noted at I-C, *supra,* however, Congress in 1972 included the § 23(a) proviso in its mix of reforms to the

[17] Burying unfavorable statutory language in ellipsis is one thing, omission quite another. "The Bluebook" specifies certain signals when omissions occur at the end of a quoted sentence. *The Bluebook,* § 5.3 at p. 45. Under the circumstances, Petitioners' repeated omission is obviously not unintentional.

LHWCA adjudicatory process, undoubtedly agreeing with Professor Larson: "[W]hen [a] rule whose relaxation is in question is more than a merely formal requirement and touches substantial rights of fair play, no relaxation is justified[.]" [A. Larson, 2B, *The Law of Workmens' Compensation,* § 77A, p. 15-1 (1993)].

Amici submit that the question of assigning the burden of persuasion, which can have the effect of also setting an evidentiary standard higher than the APA norm, essentially two sides of the same coin, does indeed touch substantial rights of fair play, even in the sense of procedural fairness under the Due Process Clause. See *Concrete Pipe & Products of California, Inc.* (slip opinion at 23). The drafters of the APA specifically designed this statute to avoid administrative assignments that raise these very concerns.

The text of the LHWCA/APA statutory scheme is quite clear. By its very terms § 23(a) expressly acknowledges the dominant role of § 19(d) of the Act, 33 U.S.C. § 919(d), that in turn expressly incorporates the APA, including the § 7(c) burden of proof and evidentiary standards, set out at 5 U.S.C. § 556(d), as governing LHWCA claims adjudications.[18] Only a construction of the Act that omits the first and ignores the second of these two provisos permits Petitioner's contention that LHWCA adjudications can escape § 7(c) standards.

Had Congress chosen to modify the application of the APA to the LHWCA in 1972, it certainly knew how to do so. The Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.,* enacted two years prior to the LHWCA but originating in the same Committees, con-

[18] Section 7(c) of the APA, 5 U.S.C. § 556(d) reads in part as follows: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

tains specific language eliminating or modifying APA standards. (See, e.g., 29 U.S.C. § 655 and § 659)

B. Section 7(c) of the APA Places the Ultimate Burden of Persuasion on LHWCA Claimants Consistent With This Court's Reasoning in *Transportation Management* and *Steadman*

In the interests of attempting to simplify the Federal Petitioner's latest construction of § 7(c) of the APA made on brief, *Amici* believe that the following accurately portrays Petitioner's logic.

Petitioner admits that LHWCA "does not specify which party should bear the ultimate risk of non-persuasion . . ." i.e., the burden of persuasion (Br. at 15, 23). Petitioner then argues that the Secretary's authority to assign the risk of non-persuasion falls within the scope of the "except as otherwise provided by *statute*" exculpatory proviso of APA § 7(c), thereby escaping § 7(c)'s general rule, because "statute" should be read to include "presumably regulat[ions] . . . ," Br. at 35, and "administrative schemes" (Br. at 47). Petitioner, which has heretofore accepted that the APA "generally" applies to LHWCA claims determinations, as noted above, then argues that § 7(c)'s general rule only assigns one component of the burden of proof to a claimant, i.e., the burden of production, Br. at 34-35, citing a footnote in this Court's *NLRB v. Transportation Management Corp.* opinion, discussed below. Therefore, the reasoning goes, the Secretary of Labor, is unhampered by *any* statutory authority and is completely free to administratively assign the second component of the burden of proof, the risk of non-persuasion, to the defending employer.

Finally, in case the logic of this argument does not persuade the Court, Petitioner's fall-back position cuts to the heart of the matter. "[I]n any event, whatever restrictions § 7(c) imposes do not apply to claims adjudications under the LHWCA and the BLBA" (Br. at 17, 43). The event in question being whether or not the burden of proof specified by § 7(c) includes both parts of what traditionally is thought of as the burden of proof.

Amici note that by this same logic the Secretary would also be permitted to assign the burden of production and set evidentiary standards higher or, for that matter, lower, than the norms established by the APA. The Secretary would in effect become a legislative authority unto itself. Petitioner's sophistic logic is demonstrably short of what Congress had in mind when it incorporated APA § 7(c) into the LHWCA. It also flies in the face of what Congress intended with passage of the APA in 1946 and subsequent opinions of this Court fleshing out the requirements of § 7(c). The plain meaning of APA § 7(c) is, then, the crux of the only real issue before the Court.

As just noted, Petitioner bases a goodly portion of its argument on footnote 7 of this Court's opinion in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 (1983). Notably, however, Petitioner's fall-back position is completely at odds with Petitioner's own reading of this footnote. Petitioner completely misses the significance of *Transportation Management*. This case, as acknowledged by the then Federal Petitioner, involved the question of which party bore the ultimate burden of persuasion set by statute, The National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, after an affirmative defense had been raised. The Federal Petitioner in this case, the National Labor Relations Board, acknowledged on brief that the provisions of the Labor Act placed the ultimate burden of persuasion on the Board's general counsel and, being "more specific provision[s of another Act] . . . govern" over the requirements of § 7(c) of the APA. *Transportation Management*, Brief of Federal Petitioner, p. 36. This Court agreed with the Federal Petitioner's analysis and held accordingly.

Thus the issue in *Transportation Management*, while concerned with the proper assignment of the burden of persuasion, dealt with a statutory assignment *outside* the mandate of the APA, not an administrative assignment that clearly falls *within* APA §7(c). Consequently, the

most that APA § 7(c) could require in a situation where another statute sets its own burden of persuasion, is the burden of production. The Court's footnote acknowledged as much and no more and should not be read, as Petitioner has done, to place the assignment of the burden of persuasion in APA governed adjudications outside the APA.

Two terms prior to *Transportation Management* this Court did have occasion to examine § 7(c) of the APA, although the issue before that Court did not concern the assignment of the burden of proof, but rather the evidentiary standard of proof required before a proponent of an order could prevail. In *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 102 (1981), this Court held that the "traditional" preponderance of evidence standard is the standard of proof necessary to satisfy § 7(c)'s burden of proof requirement.

In order to prevail in an APA governed adjudication then, the party who has the burden of persuasion must produce evidence that is slightly superior to that produced by the other party. Although all parties now before this Court apparently agree on this point, it certainly cannot be said that a claimant who prevails under the true doubt rule has proffered evidence superior to that offered by the contesting employer. *Amici* suggest that *Steadman* is the proper answer to the true doubt rule for this reason, and for a slightly different reason as well. *Steadman*'s preponderance standard, the "most common standard in the civil law," *Concrete Pipe & Products of California, Inc.* (slip opinion at 18), certainly reflects the intent of the drafters of the APA to incorporate the traditional and most common civil law standards throughout all of § 7(c).

It is clear from the language of § 7(c), which states in part, "Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof*[]" that, by its express terms, it places the entire burden of proof on a LHWCA claimant. This choice, like the evidentiary preponderance standard at issue in *Steadman*, is

also the "traditional" and "most common" placement found at civil law.

Contemporary authorities certainly thought this to be so. Section 7(c) "states the customary rule that the proponent of a rule or order shall have the burden of proof." *Attorney General's Manual on the Administrative Procedure Act*, Appendix, p-133 (1947). "The provision relating to the burden of proof is the standard rule." Senate Comparative Print, p. 15 June 1945 (Senate Document No. 248, 79th Congress, 2nd session, p. 31 (1946)).

The language of § 7(c) does not distinguish between the two components of the burden of proof. Traditionally, at common law, the burden of proof consists of two parts, the burden of production, i.e., going forward, and the burden of persuasion, i.e., risk of non-persuasion. While the former burden is said to shift throughout the adjudication, the latter burden does not and is always allocated to the party initiating an action. However exceptions to the initial allocation rule are recognized and include certain presumptions, affirmative defenses and similar legal devices that *temporarily* shift the burden of persuasion to the contesting party.

But the ultimate burden of persuasion always remains with the initiating party, as it did in both *Transportation Management* and *Steadman*. Section 7(c)'s burden of proof requirements must reflect this traditional and customary placement of the burden of persuasion, just as this Court found that the section's evidentiary standard reflected the traditional preponderance standard.

This result is further compelled by the intent of the APA to preserve common law rights. "This subchapter . . . do[es] not limit or repeal additional requirements imposed by statute *or otherwise recognized by law*." 5 U.S.C. § 559 (emphasis added). One commentator points out that this language and its legislative history "[S]pecifically provides that the APA shall not be interpreted to limit or repeal common law rights." Davis, *Administrative Law of the Eighties*, Supplement to Administrative Law Treatise, §§ 6:35-6:39, p. 219 (1989).

Given the clear language of § 7(c) and the intent of its drafters, there is no reason whatsoever for this Court to depart from the traditional and customary placement of the burden of persuasion for administrative adjudications governed by the APA. The precise reasoning that led the *Steadman* Court to conclude that the § 7(c) evidentiary standard is the traditional standard compels the same conclusion in *Maher* and *Greenwich Collieries*. The § 7(c) placement of the burden of proof, including the burden of persuasion, can only be the traditional and customary one.

Congress has not mandated a different standard for LHWCA claims adjudications despite the best efforts of the Secretary of Labor to prove otherwise. The Federal Petitioner is well aware that Congress, unlike an agency subject to the APA, may assign the burden of persuasion, just as it might "mandate[] a more stringent evidentiary standard than preponderance," *Steadman* (Brief for Federal Respondent at 41).

Indeed, Congress has often done so. For example, eight years after the 1972 LHWCA Reform Amendments, Congress enacted another massive rewrite of an existing benefits law, the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, completely overhauling ERISA, Title IV as it applied to multiemployer pension plans. Congress assigned the burden of persuasion in arbitration proceedings to an employer contesting an assessment of withdrawal liability by a pension plan. *Concrete Pipe & Products*, slip opinion at 26, 27.

Any placement of the burden of persuasion other than the traditional placement will eventually erode both *Steadman* and the footnote in *Transportation Management*.

Amici submit that Petitioner's newest fall-back argument made on brief, i.e., that § 7(c) does not govern LHWCA claims "in any event" (Br. at 43), is a tacit acknowledgement that Congress clearly meant to include the burden of persuasion, along with the burden of production, within the scope of § 7(c). As a practical matter, Petitioner has acknowledged that any interpretation of § 7(c) that retains the burden of production within the ambit of the APA, but splits out the burden of persuasion for arbitrary administrative assignment, is ludicrous.

C. The Assignment of the Burden of Persuasion by the DoL Supersedes APA Authority

Section 12 of the APA states clearly that "Subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly" (5 U.S.C. § 559).

No reasonable argument can be made that any LHWCA legislation enacted by Congress has expressly superseded the APA's burden of proof requirements. Certainly neither the 1972 nor the 1984 Amendments override *any* APA requirement, including § 7(c)'s assignment of the burden of proof. As noted at I-C, *supra*, the 1972 Amendments expressly incorporated the APA without any modifications. And as noted at n.10, *supra*, the 1984 Amendments expressly reaffirmed this Court's *U.S. Industries* opinion governing the scope of the LHWCA statutory presumptions without any recognition whatsoever of this alleged rule.

Petitioner's administrative construction of the rule contradicts the APA statutory scheme. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). As such the Department of Labor has exceeded its adjudicatory authority granted by the APA, and the rule violates § 12 of that Act.

Nor can any reasonable argument be made permitting the Federal Petitioner to ignore other substantive provisions of the APA. In addition to superseding § 7(c) of the APA, the Secretary's actions have overlooked the following APA provisions; the publication requirement, 5 U.S.C. § 552; the requirement that ALJ's adhere to an Agency's published rules and statutory powers, 5 U.S.C. § 556(c); and the requirement that a *substantive*

"rule" of an agency having "future effect designed to . . . prescribe law or policy" [5 U.S.C. 551(4)] be subject to notice and comment rulemaking (5 U.S.C. § 553).[19]

Amici suggest that, on the question of supersedure of the APA, the answer is evident. The Federal Petitioner is not only exceeding the adjudicative norms expressly required by the APA, Petitioner is not even attempting to conform to the minimum APA regulatory standards proscribed by Congress. Petitioner's true doubt rule simply ignores the APA.

III. THE ALLEGED "TRUE DOUBT RULE" IS A LITIGATING POSITION ADVANCED "ON BEHALF OF THE SECRETARY" AND DUE NO DEFERENCE BY THIS COURT UNDER THE CIRCUMSTANCES

As noted above, the Federal Petitioner readily admits that the LHWCA "does not specify which party should bear the ultimate risk of non-persuasion[.]" (Br. at 15, 23). Moreover, the Petitioner's complete dearth of regulations on the subject is a constructive admission that the LHWCA/APA statutory scheme does not, in fact, delegate any authority to the Labor Department to assign the burden of persuasion administratively.

Not surprisingly then, Petitioner's claim of the right to assign the burden has been advanced solely in litigation. Petitioner's arguments made on brief, certainly those concerning the proper LHWCA/APA statutory construction, are no more than *post hoc* rationalizations for the true

[19] See, e.g., the *Attorney General's Manual on the Administrative Procedure Act*, p. 13 (1947), distinguishing between a "rule" and an "order" under the APA. ("The definition of rule is not limited to substantive rules, but embraces interpretative, organizational and procedural rules as well" and rules "[M]ust be of *future effect* . . ."). Substantive rules are further described in the *Manual* to be "rules issued pursuant to statutory authority to implement statutory policy." p. 13, footnote 5. In this respect, at least, the Federal Petitioner is acting consistently with the APA. Amici hazard to guess that, to the Labor Department's way of thinking, the true doubt "rule" is not subject to APA rulemaking requirements, even though it clearly has future effect, because it is *de facto* without any LHWCA statutory basis.

doubt rule. Such litigating positions are frowned upon by this Court and are "not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in a reviewing court." *Martin v. OSHRC*, —— U.S. ——, 111 S.Ct. 1171 (1991) (slip opinion at 11).

This Court has recognized the policy making authority of the Director, OWCP and has held that the Director's "consistent practice" is "entitled to deference." *Morrison-Knudson*, 461 U.S. 624, at 635. However, this Court has held repeatedly that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *John Hancock Mutual Life Ins. Co. v. Harris Trust*, —— U.S. —— (1993) (slip opinion at 23) (citation omitted). This Court has also consistently held that "administrative constructions that are contrary to clear Congressional intent" must be rejected, *Chevron, USA., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9) (1984) (citations omitted), and that courts "[S]hould not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." *Cowart*, slip opinion at 6.

Despite Petitioner's best efforts at amassing its arguments, whether individually or collectively they can only be construed to contradict the LHWCA/APA statutory scheme. The basis for judicial deference—reasonable and in keeping with statutory authority—is, then, missing.

CONCLUSION

Contrary to the Federal Petitioner's assertions on brief and its long line of cited cases, the alleged true doubt rules does not have a lengthy pedigree. Rather it has a short but tortured and completely manufactured history. It is pure legal sophistry.

The rule is in effect a "remedial alternative" to the adjudication procedures proscribed by the LHWCA/APA and to controlling LHWCA opinions of this Court. Taking Judge Easterbrook's rhetorical question one step further, could it be that the Federal Petitioner is attempt-

ing not only to "override the judgment of Congress[.]" but also controlling opinions of this Court? *Freeman United Coal Mining Co. v. Director, OWCP*, 999 F.2d 291 (7th Cir. 1993, statement of Easterbrook, J.). *Amici* submit that the answer is self evident.

The APA, which is essentially a statutory roadmap through the 5th Amendment's Due Process clause, has kept regulatory conflict to a minimum since its enactment almost 50 years ago, principally because it reflects elementary notions of fairness and common legal norms. Heretofore, there has simply been no room for "rules" like the alleged true doubt rule within the APA's proscriptions. Should the rule and the Federal Petitioner's outright attempt to supersede the APA now be upheld, the APA may well be on its way to being cast adrift.

Given the Federal Petitioner's apparent desire to escape the restrictions of the APA, the yawning maw of government feared by this court in *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 167 (1962), will be open wide unless the two decisions below are affirmed.

Amici respectfully urge this Court then to affirm both *Maher Terminals* and *Greenwich Collieries*.

Respectfully submitted,

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